IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 199 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME TAX

Versus

AMBICA MILLS LTD

Appearance:

MR P.G. DESAI with MR MANISH R BHATT for Petitioner
MS HANSA B PUNANI for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

Date of decision: 13/04/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The Income Tax Appellate Tribunal, Ahmedabad has referred the following four questions for the opinion of this Court under Section 256(1) of the Income Tax Act, 1961:-

1. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the medical expenses, telephone expenses and accident insurance premium should not be disallowed under Section 40A(5) of the I.T Act, 1961?"

2. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that a sum of Rs. 1,40,000/- paid by the assessee to Messrs Dastur & Co. for obtaining feasibility report for a project should be allowed as business expenditure?"

3. "Whether on the facts and in the circumstances of the case the Tribunal was right in law in coming to the conclusion that depreciation and development rebate should be allowed to the assessee in respect of RCC roads constructed by the assessee?"

4. "Whether, on the facts and in the circumstances of the case the Tribunal was right in law in coming to the conclusion that in respect of the machinery installed in its machinery division the assessee was entitled to relief under Section 80I of the Income Tax Act, 1961?"

2. The matter relates to the Assessment Year 1972-73. In its return of income filed on 30.6.1972, the assessee company which carried on business of manufacturing textiles, steel tubes, machineries, gas cylinders and chemicals, claimed deduction of the expenditure that it incurred by providing the medical expenses, telephone expenses and personal accident insurance premiums of three managing directors of the company. The ITO disallowed these expenses and added them to the income of the assessee under Section 40A(5) of the said Act. In appeal, the CIT (Appeals) deleted all these three items in respect of which the assessee incurred expenditure, from the computation of the disallowance. The Tribunal held in appeal that the reimbursement of medical expenses, telephone expenses etc. did not amount to `perquisite' within the meaning of Section 40A (5) of the Act and confirmed the order of the CIT (Appeals) on that count.

This question had arisen in the assessee's own case in Income Tax Reference No. 277/87, decided on 11.3.1998 in respect of the Assessment Years 1980-81 and

1981-82, so far as medical reimbursement is concerned. Following the decision of this Court in Gujarat Steel Tubes Ltd. Vs. CIT, reported in 210 ITR 358 and for the reasons recorded in our judgement dated 11.3.1998 in ITR No. 277/87, we hold that reimbursement of medical expenses and telephone expenses to the managing directors would be benefits within the meaning of the provisions of Section 40(c)(i) of the Act and therefore, the expenditure incurred by the assessee company in respect of these items is required to be computed in the disallowance under Section 40(c) read with Section 40A(5) of the Act. The Tribunal therefore, in our view, committed an error in holding that the medical expenses and telephone expenses should not be disallowed. The question No.1 is therefore, answered in the negative against the assessee as regards these two items of medical expenses and telephone expenses.

As regards the expenditure incurred on payment of insurance premiums in respect of the policies that the assessee company had taken out for the managing directors, the question is concluded by our decision in assessee's own case in ITR No. 88/83. Similar question had also arisen in ITR No. 147/89, which came to be considered in respect of another assessee. As held by us, the question whether premium paid for policy taken out for the managing director would constitute benefit to the director within the meaning of Section 40(c), would depend upon the nature of policy, who had taken it out and whose obligation was it to pay the premium. If the intention of the company by taking out such policy of insuring directors against personal accident was in fact to insure itself in respect of the liability that may arise towards the director as a result of the accident, then that situation would be different from a director himself taking out a personal accident insurance policy under which he would be obliged to pay the premium and not the company. If such premiums are reimbursed to the director, which is an obligation of the director himself to pay and not that of the company, qua the insurance company, then that would amount to a benefit to the director within the meaning of the provisions of Section 40(c) of the said Act. In the present case, it is not shown that the director himself wanted to take out the policy or that it was his own obligation to pay the premiums and in fact no such contention was canvassed by the assessee before the lower authority. The amount of premium was Rs. 1,182/- for each of the two managing directors and Rs. 1,191/- for the third managing director. It appears that the premiums were paid directly by the company which had taken out the policies

in respect of these three directors. We therefore do not find any error of law committed by the Tribunal in holding that the personal accident insurance premium was not meant to be a benefit or perquisite to the directors and therefore, should not be disallowed. Question No.1 to the extent it relates to the expenditure of insurance premium, is therefore answered in the affirmative against the Revenue.

3. As regards question No.2, the assessee had claimed a sum of Rs. 1,40,000/- as business expenditure on the ground that it was incurred in getting a feasibility report for putting up a mini steel plant. Admittedly, the project did not materialise. The ITO held that these expenses were not made wholly and exclusively for the purpose of business and disallowed them. The CIT (Appeals) took note of the fact that one of the units of the assessee, manufactured steel tubes, and on that basis, held that the expenditure incurred in respect of the project of a mini steel plant, was an expenditure incurred for the purpose of business and granted relief to the assessee in that regard. The Tribunal, in appeal preferred by the Department, held that it had occasion to consider an identical issue in the assessee's own case for the Assessment Year 1962-63 and for the reasons recorded in paragraph 40 of its earlier order dated 31.3.1979, it held that the said expenditure was incurred for the purpose of business and was therefore, rightly allowed by the Commissioner (Appeals). In paragraph 40 of the order of the Tribunal which it had referred to and which was read before us, there was reference to a project for manufacture of seamless pipes in that matter and the assessee's contention was that the expenditure that it had incurred was in the course of its own business of manufacture of pipes. It is in that context, that the Tribunal in para 40 of it's order dated 31.3.1979 (ITA 688/AHD/77-78), to which it has referred, held that the assessee was admittedly carrying on business of manufacture of tubes and was having substantial income therefrom. It is in this context the Tribunal had earlier held that the expenditure incurred in respect of the project of manufacture of seamless pipes could be claimed for deduction as business expenditure by the assessee. In the present case, however, the expenditure was incurred by the assessee over getting feasibility report, for setting up a new mini steel plant, from Messrs Dastur & Co. which project ofcourse did not materialise. The mini steel plant which the assessee wanted to put up was quite different from its existing business of

manufacturing steel tubes. The Tribunal proceeded on an erroneous footing that the question involved in the assessee's case pertaining to the assessment years 1962-63 to 1969-70 which the Tribunal had decided on 31.3.1979, was identical. As noted above, in that case the expenditure was incurred on project for manufacture of seamless pipes and not in respect of establishing any new mini steel plant. Similar question had arisen in CIT Vs. SLM Maneklal Ltd., reported in 107 ITR 133, wherein the assessee had claimed deduction in respect of the expenditure incurred on getting an expert opinion for erecting a foundry, which was to be started for manufacturing raw-materials. This Court held that since the expenditure in question was incurred for the purpose of bringing into existence a capital asset, it must be held to be an expenditure of a capital nature within the meaning of Section 37 of the Act and hence, the deduction could not be allowed under that provision by treating it as business expenditure. In CIT Vs. Digvijay Cement Co.Ltd., reported in 159 ITR 253, this Court had held that in order to determine whether an expenditure is of the nature of revenue or capital, the aim and object of the expenditure should be considered. An expenditure would be capital in nature if it is made with a view to bringing into existence an asset or an advantage of an enduring nature. But ofcourse, it is not at all necessary that it should have had that result. In that case the Court was concerned with the expenditure in obtaining a feasibility report for setting up a shipyard, which report was not favourable for the project and no shipyard was infact established. It was held that the expenses were incurred with a view to decide whether an asset or advantage of almost a permanent nature should be brought into existence or not and therefore, it was capital in nature and not deductible. In the present case also, the project of putting up a mini steel plant was a new project, which the assessee wanted to put up and it had therefore, engaged Messrs Dastur & Co. for giving a feasibility report in respect of such new project. The project of putting up a mini steel plant was entirely different from the existing business of the assessee of manufacturing steel tubes. The expenditure incurred for obtaining the feasibility report was therefore, a capital expenditure and could not have been treated as revenue expenditure incurred in respect of the existing business of the assessee. The Tribunal therefore, committed an error in allowing the said expenditure as business expenditure. Question No.2 is accordingly answered in the negative against the assessee and in favour of the Revenue.

4. The third question relates to the depreciation and development rebate which the assessee claimed in respect of RCC roads constructed by it. The ITO had disallowed the claim. The CIT (Appeals) confirmed the disallowance. The Tribunal followed its earlier decision in assessee's own case for the Assessment Years 1962-63 and 1969-70 and held that the controversy was fairly covered by its earlier decision and came to the conclusion that depreciation and development rebate should be allowed in respect of RCC roads constructed by it.

Similar question had arisen before this Court in Kheda District Co-operative Milk Producers' Union Ltd. Vs. CIT, reported in 162 ITR 496 and it was held that approach roads to a factory would not be a `plant' and were not entitled to development rebate, but they were entitled to depreciation as building. This view was approved by the Supreme Court in CIT Vs. Gwalior Rayon Mfg. Co.Ltd., reported in 196 ITR 149, in which case it was held that roads laid within the factory premises as links or providing approach to the buildings to carry on the business activities of the assessee are "buildings" within the meaning of Section 32 of the Income Tax Act, 1961 and depreciation is admissible on the capital expenditure incurred thereon. Depreciation on buildings, machinery, plant or furniture owned by the assessee and used for the purposes of business or profession is a permissible deduction under Section 32 of the Act. So far as development rebate is concerned, as can be seen from the provisions of Section 33 of the Act, it could be claimed in respect of a new ship or a new aircraft, new machinery or plant, other than office appliances or road transport vehicles, owned by the assessee and wholly used for the purposes of the business carried on by him. Therefore, there is no mention of buildings in Sec.33 under which development rebate is claimed. Obviously therefore, if roads are to be treated as building, no development rebate can be claimed by the assessee and only depreciation can be claimed under Section 32 of the Act. We therefore hold that the Tribunal was right in coming to the conclusion that depreciation should be allowed to the assessee in respect of the RCC roads constructed by it but was wrong in holding that development rebate should also be allowed accordingly. Question No.3 is accordingly partly answered in favour of the assessee and partly in favour of the Revenue.

5. As regards question No.4, the claim of the

assessee of Rs. 13,211/- related to deduction claimed by it under Section 80I of the Act in respect of profits from the unit known as "Ambica Machinery". The ITO disallowed the claim in tune with his earlier approach in respect of the Assessment Year 1968-69. The CIT (Appeals) in paragraph 41 of his order, referring to the Tribunal's earlier order, granted the relief to the assessee. The Tribunal considered this claim under Section 80I on the footing that the controversy was fully covered by its decision in assessee's own case for the Assessment Year 1962-63 and 1969-70 and the matter stood covered by the reasoning given by the Tribunal in paragraph 48 of its earlier order dated 31.3.1979 in I.T.A No. 678/AHD/77-78. The Tribunal found that no distinguishing feature was placed before it to take a different view and held that the Commissioner (Appeals) was justified in allowing the claim of the assessee in the light of its earlier decision. We have been taken through the earlier order of the Tribunal on which reliance was placed for deciding this point and we find that in paragraph 48 of its earlier decision, the question involved was of development rebate under Section 33 of the Act and there was no question relating to the claim of the assessee under Section 80I of the Act. In paragraph 48 and 48A of its earlier order, the Tribunal, taking into account the assessee's claim made on the footing that additional machinery was installed in its Textile Division and Machinery Division, gave a direction to the ITO that higher development rebate should be allowed to the assessee. In the present case the claim was put up under Section 80I of Rs. 13,211/- in respect of the unit known as Ambica Machinery. Under Section 80I, a provision existed at the relevant time in respect of deductions related to profit and gains from priority industry in the case of certain companies. The expression `priority industry' was defined in Section 80B(7) of the Act and these were enumerated in Schedule VI to the Act, which contained the list of articles and things in context of the provisions of Section 80B(7) and 80I of the Act. Item (4) of that list referred to "Industrial machinery specified under the heading "8. Industrial Machinery", sub-heading "A. Major items of specialised equipment used in specific industries", of the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951)". It appears that the Tribunal did not notice that the question in paragraph 48 of its earlier order on which it relied, did not at all relate to any claim of deduction under Section 80I and proceeded on an erroneous footing that the claim related to development rebate which was subject matter of that paragraph 48 of its earlier order. This is why we are

constrained to hold that the Tribunal committed an error in concluding, on the basis of paragraph 48 of its earlier order, that the machinery installed in the Machinery Division of the assessee was entitled to relief under Section 80I of the Act. This question really remained out of focus, since the Tribunal, perhaps on some statement being made on behalf of the parties, proceeded on an erroneous footing that this controversy was covered by paragraph 48 of its earlier order. Question No.4 is accordingly answered in the negative for these reasons and it will be open for the Tribunal to consider the claim in light of the then existing provisions of 80I read with Schedule VI of the Act.

The reference stands disposed of accordingly with no order as to costs.

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